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ABSTRACT

New Jersey's Public Schools Contracts Law, enacted on June 2, 1977, places limits on the authority of local and regional boards of education to make purchases and to enter into contracts, agreements, or leases for supplies or services. This publication is designed to provide information and guidance that will assist boards of education in meeting legal requirements for contracts and in keeping abreast of pertinent developments in the law. The first five sections cover legal requirements governing the initial stages in negotiating a contract: advertising for bids, soliciting quotations, drawing up specifications and plans, bidding requirements, and the contract itself. The last five sections cover the following special cases: (1) school building repairs: supervision, inspection, condemnation, rejection; (2) sale of personal property; (3) set-aside programs for women and minority businesses; (4) joint purchasing agreements; and (5) miscellaneous provisions. Appended is a flowchart showing the contract-bidding procedure for public works contracts by public schools. (TE)

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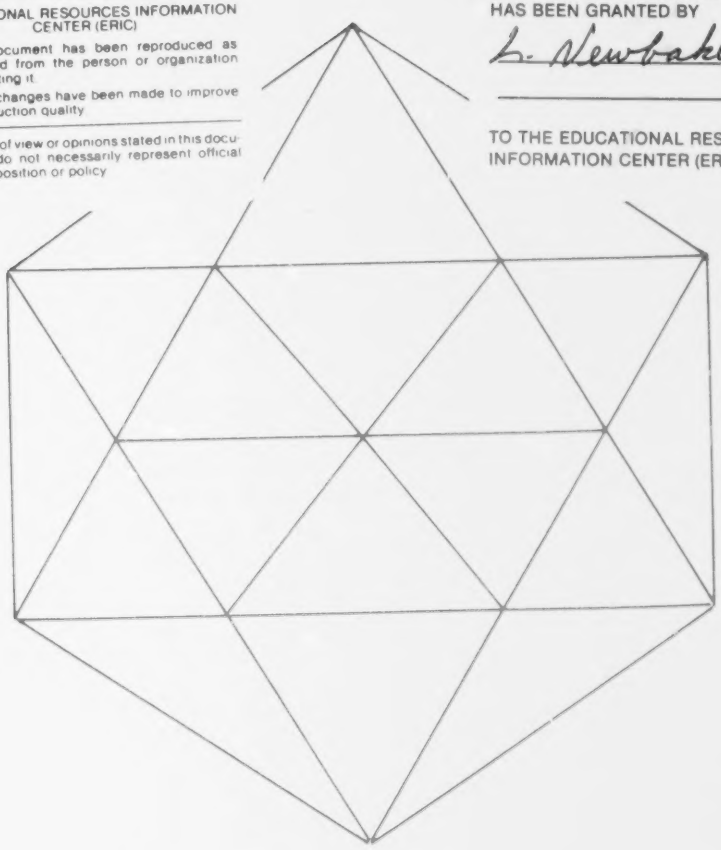

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FOCUS ON: THE PUBLIC SCHOOLS CONTRACTS LAW

THE PUBLIC SCHOOLS CONTRACTS LAW

New Jersey School Boards Association
Focus On School Law Series
FOCUS ON: THE PUBLIC SCHOOLS CONTRACTS LAW
Trenton, New Jersey

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INTRODUCTION

The enactment of Chapter 114, known as The Public Schools Contracts Law (*N.J.S.A.* 18A:18A-1 *et seq.*) on June 2, 1977, provided a new legislative scheme for contractual transactions involving the expenditure of school funds by boards of education. The requirements of this law are similar to the ones prescribed by the Local Public Contracts Law, (*N.J.S.A.* 40A:11-1 *et seq.*) which governs purchases by municipal governments.

Previously, school districts had to comply with the contract provisions of Chapter 18 of Title 18A as well as the Local Public Contracts Law in Title 40A. For years, there existed various ambiguities between the two laws and a resulting inconsistency in the public policy relating to this area of contracts. Local boards of education, which operated on a somewhat different format than other units of government, were confused with the conflicting requirements of the two laws.

The effect of the 1977 enactment was to exclude school districts from the municipal contracts law, and bring them solely under the provisions of Chapter 114.

The Public School Contracts Law applies to the board of education of any local, regional, consolidated or county vocational school district, and other similar bodies established and operating under the provisions of Title 18A of the New Jersey Statutes. (*N.J.S.A.* 18A:18A-2(a)). It places limits on the authority of such bodies to make purchases, and to enter into contracts, agreements or leases for the performance of any work or the furnishing of any materials, supplies, equipment or services. As required by the law, the State Board of Education has adopted rules and regulations for the implementation of the statutory provisions. These can be found at *N.J.A.C.* 6:20-7.1 *et seq.*, *N.J.A.C.* 6:20-8.1 *et. seq.* and *N.J.A.C.* 6:22 *et seq.*

The purpose of this publication is to provide information and guidance to assist the boards of education in meeting legal requirements and in keeping abreast of pertinent developments in the law.

This publication should be used only as a reference tool. Should there be a specific question or a need for an interpretation of a statute, the board's attorney should be consulted.

ADVERTISING FOR BIDS

Purchases, Contracts and Agreements Requiring Advertising—The "Bid Threshold"

The cornerstone of the Public School Contracts Law is the general requirement that goods and services be obtained only after public advertisement and competitive bidding. Although there are numerous exceptions to these requirements set forth in the law, an understanding of the bidding process is the logical place to begin an analysis.

The law requires public advertising and competitive bidding for every purchase, contract, or agreement which meets the following criteria:

- Involves the performance of work or the furnishing or hiring of any materials or supplies;
- The cost exceeds an established level ($8,100 effective July 1, 1985 as determined by the Governor); and,
- The cost is to be paid out of school funds. (*N.J.S.A.* 18A:18A-3).

As stated by the Supreme Court, the purpose of the statutory law requiring advertisement for bids prior to the awarding of contracts is to obtain a reasonable price and to guard against favoritism, improvidence, extravagance and corruption. *State v. General Restoration Co., Inc.*, 42 *N.J.* 366 (1964); *Asbury Park Board of Education v. Hoek*, 38 *N.J.* 213 (1962); *Hillside Township v. Sternin*, 25 *N.J.* 317 (1957). To this end, the court specifically noted that the statute should be construed with primary focus on the public good since the provisions are directed toward the benefit of the taxpayers and not the bidders. (*Id*). Therefore, the specific aim of the statute is one of protecting the public interest by keeping cost at a minimum. *Board of Education of Asbury Park v. Hoek*, 38 *N.J.* 213 (1962).

Whenever the cost of work to be performed, materials to be acquired or supplies to be furnished exceeds the pre-determined level, there must be a formal contract or an agreement executed. (*N.J.S.A.* 18A:18A-4). Contracts, as defined by the statute, means contracts or agreements for the performance of work or the furnishing or hiring of services, materials, or supplies as distinguished from contracts of employments. (*N.J.S.A.* 18A:18A-2(c)).

The level at which public advertising and competitive bids are required is determined every two years by the Governor, in consultation with the Department of Treasury, pursuant to *N.J.S.A.* 18A:18A-3(b). Effective July 1, 1985, the amount as adjusted is $8,100. The Governor is required to give notice of the adjusted amount to all of the local school districts. The procedure of making an adjustment every two years allows the bid threshold amount to be adapted to the economy without the need of further legislative amendments to the statute.

In determining if a purchase meets the bidding threshold, it is important to remember that dividing contracts or purchases which are single in character into subcategories is specifically prohibited by statute. (*N.J.S.A.* 18A:18A-8). The purpose of this prohibition is to preclude the division of the purchases into parts, such that the cost would fall below the threshold amount and thus permit the avoidance of advertising for bids. School boards would be wise to estimate all purchases of a similar nature over the course of a year so as to avoid a charge of sidestepping

the law. The statutes, therefore, provide that the following types of work are not to be divided but to be included in one purchase, contract, or agreement:

- the doing of any work included in or incident to the performance or completion of any project, which is single in character or inclusive of the furnishing of additional services, equipment, buying materials or supplies, or the doing of additional work; or
- any work which requires the furnishing of more than one article of equipment, buying materials or supplies, all of which are requisite for the completion of such project (*N.J.S.A.* 18 A:18A-8).

For purchases which exceed the bidding threshold, a board of education must solicit for bidders at least annually. (*N.J.S.A.* 18A:18A-9).

Exceptions to the "Advertising Requirement"

There are certain specific areas where advertising for bids is not required even where the purchase or contract exceeds the threshold amount. Nevertheless, the tendency of the courts has been to narrowly construe these exceptions in favor of the public interest.

The following is a list of purchases, contracts, or agreements which, in accordance with *N.J.S.A.* 18A:18A-5, may be made, negotiated, or awarded by the board of education by resolution at a public meeting without public advertising for bids:

1. Professional Services
2. Extraordinary Unspecifiable Services
3. Work by Employees
4. Printing of Certain Legal Information
5. Publications
6. Food Services and Supplies
7. Public Utility Services
8. Bond and Document Printing
9. Equipment Repair (EUS)
10. Insurance
11. Legal Notice Publications
12. Artifacts
13. Election Expenses
14. Electronic Data Processing Service
15. Driver Education Courses
16. Energy Conservation
17. Federal, State or Municipal Contracts
18. Failure to Receive Bids
19. High or Collusive Bids
20. Purchases made through the State Agency (open ended supply contracts)
21. Quotation Price Lower than State Agency's
22. Emergency Purchases & Contracts

A more detailed explanation of the above listed exceptions is as follows:

1. Professional Services

Professional services can fall into two groups.

a. *Services which are:*

- rendered or performed by a person authorized by law to practice a recognized profession, and
- rendered or performed by a person whose practice is regulated by law, and
- the performance of which requires knowledge of an advanced type in a field of learning acquired by a prolonged formal course of specialized instruction and study as distinguished from general academic instruction or apprenticeship and training.

b. *Services which are:*

rendered in the performance of work that is original and creative in character in a recognized field of artistic endeavor. (*N.J.S.A.* 18A:18A-2(h)).

Although neither the statutes nor the regulations provide much assistance in determining whether a particular service falls within this category, several court decisions provide some direction.

In a case involving an insurance policy, the court was asked to interpret the meaning of the term "professional services" as used within the policy. That court found that the essence of a professional service is that it involves "specialized knowledge, labor, or skill and the labor or skill is predominantly mental or intellectual, rather than physical or manual." *Atlantic Mutual Insurance Co. v. Continental National American Insurance Co.*, 123 *N.J. Super.* 241, 246 (Law Div. 1973)

The court noted in *Burlington Township v. Middle Department Inspection Agency*, 175 *N.J. Super.* 624, 631 (Law Div. 1980) that a profession inherently requires attainments in special knowledge "acquired by a prolonged formal course of specialized instruction and study as distinguished from general academic instruction or apprenticeship and training."

Although neither of these cases involved public school contracts, the analysis used in both is enlightening.

In deciding whether the service is professional, the tendency of the courts is to emphasize conceptual knowledge as opposed to practical skill. More specifically, it has been held that the practice of law is a profession and not a business, *In re Rothman*, 12 *N.J.* 528,548 (1953); that the words "business or trade" do not include the practice of medicine, which is a learned profession, *Auerbach v. Smith*, 19 *N.J. Super.* 191,194 (Ch. Div. 1952); and that an auditor renders services involving a "peculiar professional education and experience" as opposed to a person "possessed only of the capacity to furnish work and labor." *Heston v. Atlantic City*, 93 *N.J.L.* 317,320 (Sup. Ct. 1922).

2. Extraordinary Unspecifiable Services (hereinafter referred to as EUS)

Such services are defined as—

- Services which are specialized & qualitative in nature.
- Services which require expertise, extensive training and proven reputation in the field of endeavor. (*N.J.S.A.* 18A:18A-2 (g)).

The statute specifically states that this category is designated for those services which cannot reasonably be described by written specifications. This exception shall be construed narrowly in favor of open competitive bidding where possible and in each instance of such exception, the district board of education is required to state the supporting reasons for its action in the resolution awarding the contract. The regulations (*N.J.A.C.* 6:20-8.1) further restrict the awarding of a contract as an EUS by the following conditions:

a. The assertion that the service can be provided by a single contractor shall not be sufficient alone to justify the use of the EUS exception;

b. The need for expertise, extensive training and proven reputation in the field of endeavor must be critical and essential to the project and not merely a desire to have a reliable job performed;

c. Services previously bid shall be subject to the presumption that such services may not be classified as an EUS, unless the board can demonstrate the lack of feasibility of bidding such services;

d. If specifications can reasonably be written covering the services, then they must be bid, not withstanding that the other criteria of the definition may be met. Should the specifications appear to be too technical for local school officials to prepare, the following consideration should be made prior to concluding that the services are EUS:

- If the local school officials do not possess the technical skill to prepare specifications, they should engage consultant assistance to do so;
- If the services are of such a technical or massive nature as to make a description unfeasible, then the specifications should be written in terms of required end-products and/or standards of performance rather than (or in concert with) descriptions of all technical steps to be taken;

e. Services which are continued or regularly repetitive shall be subject to a presumption that specifications can be written;

f. Before awarding a contract under the EUS provisions, a designated school official of the board must file a certificate with the board describing the nature of the work to be done, stating that it is not reasonably possible to write specifications, describing the informal solicitation of quotations, providing an explanation if quotes are not sought or if the lowest responsible price is not observed, and describing in detail why the contract meets the provisions of the statute and these rules.

g. If the estimated cost exceeds the threshold amount, quotations as to the cost or price must be solicited by the board whenever practicable, and the contract shall be made on the basis of the lowest responsible quotation, the same being the one which is most advantageous to the board, price and other factors considered. (See further discussion herein under "SOLICITATION OF QUOTATIONS"at page 17)

h. Services that meet the requirements of EUS may not be combined with other work in a contract so as to avoid the necessity of bidding.

i. No firm, having been previously retained to study, survey, or prepare specifications for a given system, function or equipment may be selected as an EUS on the basis that they have acquired specialized knowledge as a result thereof. Such a firm should not be authorized to participate in bid-

ding if its earlier participation in studies would give it an unfair advantage. (*N.J.A.C.* 6:20-8.1)

3. Work by Employees
Any work done by employees of the contracting unit (the board of education).

4. Printing of Certain Legal Information
The printing of all legal notices, legal briefs, records and appendices to be used in any legal proceeding in which the board may be a party.

5. Publications
Textbooks, copyrighted materials, kindergarten supplies, and student produced publications and services incidental thereto.

6. Food Services and Supplies
Food services and supplies, including food supplies for home economics classes when purchased pursuant to rules and regulations of the State Board and in accordance with the provisions of *N.J.S.A.* 18A:18A-6 (which requires a vendor of fresh milk to agree to purchase an amount from New Jersey producers or associations at least equal to the amount that the vendor proposes to furnish the school district—(See further discussion herein under "STANDARDS FOR PURCHASE OF FRESH MILK" at page 23).

The regulations provide that "food providers" shall include only those supplies for eating or drinking and those substances which may enter into the composition of a food in the operation of a school cafeteria or in a home economics class. (*N.J.A.C.* 6:3-1.7)

Where a board of education has decided to purchase food supplies, it must adopt a policy stating what food supplies will be purchased without advertising for bids. In addition, the board must designate a person or persons authorized to purchase the food supplies, describe the procedure by which interested vendors may become eligible to submit quotations, and outline the method by which the board will solicit and accept quotations. This policy must be adopted before the opening of schools in September and must be made known to the public. (*N.J.A.C.* 6:3-1.7(a))

Public school contracts with food service management companies were previously not exempt from the bidding requirements. Because of this, the Attorney General ruled that such contracts must be bid. (AG. Advisory Opinion No. M79-4138, July 3, 1979). However, *N.J.S.A.* 18A:18A-5a (6) and *N.J.S.A.* 18A:18A-42.1 were amended effective January 21, 1986 so that food service contracts are now excepted from the bidding requirement.

7. Public Utility Services
The supplying of any product or the rendering of any service by a public utility, which is subject to the jurisdiction of the Board of Public Utilities, in accordance with the tariffs and schedules of charges made, charged and exacted, that are filed with said board.

8. Bond and Document Printing
The printing of bonds and documents necessary to the issuance and sale thereof by a board of education.

9. Equipment Repair (EUS)
Equipment repair service and necessary parts furnished in connection with such services, need not be bid if in the nature of an extraordinary unspecifiable service.

10. Insurance
Insurance, including the purchase of insurance coverage and consultant services.

11. Legal Notice Publication
The publishing of legal notices in newspapers as required by law.

12. Artifacts
The acquisition of artifacts or other items of unique, intrinsic, artistic or historic character.

13. Election Expenses
Election expenses, including advertising expenses incidental thereto.

14. Electronic Data Processing Service
Electronic data processing service obtained from another board of education.

15. Driver Education Courses
Driver education courses provided by licensed driver education schools, when it is determined by the board that the private driver education school can provide behind-the-wheel driver education that is:

- substantially equivalent to that provided by the board of education, and
- at less cost than current or other proposed programs. (*N.J.S.A.* 18A:18A-3.1).

Contracts with private driver education schools may be made, negotiated or awarded by a board of education, for any term not exceeding three years by resolution at a public meeting. The maximum term of three years is authorized so as to provide a degree of continuity in these courses which are taught as part of the school curriculum. Contracts shall be made only with private driver education schools that are approved by the Commissioner of Education. A driver education school that is the holder of a current license or certificate of approval issued by the Director of Division of Motor Vehicles shall be considered as being approved by the Commissioner of Education. A copy of the current license or certificate of the driver education school shall be maintained on file by the district board of education. (*N.J.A.C.* 6:20-8.6).

16. Energy Conservation
Performance of work or services or the furnishing of materials, supplies or equipment for the purpose of conserving energy in buildings owned by any local board of education, the entire price of which shall be established as a percentage of the resultant savings in energy costs.

17. Federal, State, or Municipal Contracts
Contracts made or entered into with the United States of America, the State of New Jersey, the county or municipality or any board, body, officer, agency or authority or any other state or subdivision thereof.

18. Failure to Receive Bids
In those cases where the board of education has met the following criteria:

a. advertised for bids on two occasions; and

b. has received no bids in response to its advertisement; and

c. after reasonable inquiry, it is determined that no board, body, officer, agency or authority of the United States, or of the State of New Jersey or of any county or municipality in which the board of education is located is willing and able to perform any work or furnish or hire any materials or supplies in conformity with the specifications of the board of education.

Any such contract or agreement entered into pursuant to this subsection may be made, negotiated or awarded only upon adoption of a resolution by the affirmative vote of two-thirds of the full membership of the board at a meeting authorizing such a contract or agreement. Any amendment or modification of the terms, conditions, restrictions and specifications which were the subject to the competitive bidding shall be stated in the resolution awarding the contract.

19. High or Collusive Bids

In any case where the board has advertised for bids on two occasions and has rejected such bids on each occasion because it believes that the prices are not reasonable, or that the bids were not independently arrived at through open competition, then that board may enter into a contract without public advertisement after the following requirements are met:

a. Notification of the intention to negotiate and a reasonable opportunity to negotiate shall be given by the board to each responsible bidder;

b. The negotiated price is—

- lower than the lowest rejected bid price of a responsible bidder who bid thereon; and
- the lowest negotiated price offered by any responsible supplier; and
- a reasonable price for such work, materials, supplies or services;

c. Any amendments or modifications of the terms, conditions, restrictions and specifications which were the subject of competitive bidding shall be stated in the resolution awarding the contract; and

d. The negotiated price is lower than the price of the same or equivalent materials or supplies available from the state, county or municipality in which the board of education is located.

e. The resolution awarding the contract is adopted by an affirmative vote of two-thirds of the full membership of the board.

If the board determines that a bid was not arrived at independently in open competition, it shall notify the County Prosecutor of the county in which the board of education is located and the Attorney General of the facts upon which its determination is based. When appropriate, the board may institute proceedings in any state or federal court of competent jurisdiction for a violation of any state or federal antitrust laws relating to the unlawful restraint of trade.

20. Purchases Made Through the State Agency (open ended supply contracts)

The Division of Purchase and Property within the State Department of the Treasury negotiates open ended supply contracts for certain items. *N.J.S.A.* 18A:18A-10 allows a board to purchase those items through the state agency without public advertisement for bids, or after a board has rejected all bids obtained.

21. Quotation Price Lower Than State Agency's Purchase Price In Any Case Where

- the board has solicited and received at least three quotations on materials, supplies or equipment for which a state contract has been issued pursuant to *N.J.S.A.* 18A:18A-10;
- the lowest responsible quotation is at least 10% less than the board would

be charged for the identical materials, in the same quantities, under the state contract; and

- the resolution awarding the contract is adopted by an affirmative vote of two-thirds of the full membership of the board.

This exception allows a district to take advantage of a price that may be even lower than the state agency's price, without undergoing a bidding process. Nevertheless, the board must meet the above requirements before a contract may be awarded under this exemption.

22. Emergency Purchases and Contracts

When an emergency affecting the health or safety of occupants of school property requires the immediate delivery of the articles or the performance of the service, provided that the awarding or making of such purchases, contracts are made in the following manner (*N.J.S.A.* 18A:18A-7):

a. A written requisition for the performance of such work or labor, or the furnishing of materials, supplies or services is filed with the contracting agent (board secretary, business administrator, or business manager), describing the nature of the emergency, the time of its occurrence and the need for invoking this statute, certified by the employee in charge of the building facility or equipment wherein the emergency occurred.

If the contracting agent is satisfied that the emergency exists, that person is authorized to award a contract for said work or labor, materials, supplies or services.

b. Upon the furnishing of such work or labor, materials, supplies or services, in accordance with the terms of the contract or agreement, the contractor furnishing such work or labor, materials, supplies or services, shall be entitled to be paid therefor and the board of education shall be obligated for said payment. The board of education shall take such action as shall be required to provide for the payment of the contract price.

The regulations tack on an additional requirement for emergency contracts—that a copy of any contract or agreement that is made, negotiated or awarded, along with a copy of the written requisition for performance, be filed with the Bureau of Facility Planning Services and office of the county superintendent of schools within three days after the awarding of the contract or agreement. (*N.J.A.C.* 6:20-8.5). If it is not an emergency contract, the contract or agreement should be filed with the Bureau within ten days after the award, whenever the entire cost of the contract exceeds $10,000. (See further discussion under "FILING OF THE CONTRACT" at page 28).

SOLICITATION OF QUOTATIONS

The "Quotation Threshold"

For those purchases which either do not meet the bid threshold amount or which are exempted from the formal requirements of public advertising, a board is required to solicit quotations whenever practicable before awarding a contract. This requirement does not apply, however, to contracts for professional services, which

may be negotiated and signed without receiving quotations. Furthermore, quotations are required only for purchases which exceed 20% of the bid threshold amount. (*N.J.S.A.* 18A:18A-37). Thus, with a bid threshold of $8,100, boards would be required to seek quotations for purchases exceeding $1,620.

Awarding the Contract When Quotations are Solicited

Once the quotations have been solicited, the contract shall be awarded on the basis of the *lowest responsible quotation* received which is most advantageous to the board, with the price and other factors being considered. (See further discussion herein under "AWARD TO LOWEST RESPONSIBLE BIDDER" at page 27.)

The statute directs the contracting agent to place on file with the contract a written explanation of reasons when—

- the purchase is for an EUS and quotes are not sought because the contracting agent has determined that it is impractical to solicit competitive quotations; or
- after soliciting quotations, it is decided by the contracting agent that the contract should not be awarded on the basis of the lowest quotation received.

SPECIFICATION AND PLANS

Generally

All specifications that are drawn for the purposes of bidding must be drafted in a manner to encourage free, open and competitive bidding. Specifications should not be drafted by potential bidders since certain circumstances could develop which would establish an unfair advantage over other bidders.

Specific Prohibitions

1. No Unrelated Restrictions or Conditions

No specification may require any standard, restriction, condition or limitation not directly related to the purpose, function or activity for which the purchase, contract, or agreement is to be made. This provision specifically prohibits superfluous restrictions which are simply used for the purpose of reducing the field of bidders. (*N.J.S.A.* 18A:18A-15).

2. No Residency Requirement

No specification may require that any bidder be a resident of, or the bidder's place of business be located in, the county or school district in which the purchase will be made or the contract is to be performed. An exception exists in those cases where the physical proximity of the bidder is essential to the efficient and economical purchase or performance of the contract. (*N.J.S.A.* 18A:18A-15).

3. No Discrimination

No specification may in any way discriminate on the basis of race, religion, sex or national origin.

Bidders must have an approved affirmative action program pursuant to the law against discrimination *N.J.S.A.* 10:5-31 *et seq.* The board is required to include in the bid specification certain language to be agreed to by the contractor.

In addition, the board must include in its advertisement for bids the following language: "Bidders are required to comply with the requirements of *P.L.* 1975, c. 127." (See *N.J.S.A.* 10:5-33) However, none of these statutory provisions are to be construed as preventing a board of education from designating that a contract be awarded to a qualified small business enterprise, a qualified minority business enterprise, or a qualified women business enterprise as per *N.J.S.A.* 18A:18A-51 *et. seq.* (*N.J.S.A.* 18A:18A-15).

4. No Brand Name Requirement

Specifications may not require the furnishing of a particular "brand name", but may instead require a "brand name or equivalent." An exception exists for materials which are patented or copyrighted. Such special items may be required by bid specifications, so long as they are necessary to carry out the purpose for which the goods are being purchased.

Boards of education are wise to be cautious when proceeding in this area, making sure that such a determination is justifiable. (*N.J.S.A.* 18A:18A-15).

5. No Omission of Terms for Renewal, Extension, Release, Extra Work, or Substantial Performance

No specification shall fail to include:

- any option for renewal, extension or release which the board of education may intend to exercise or require; or
- any terms and conditions necessary for the performance of any extra work; or
- any matter necessary to the substantial performance of the contract or agreement.

These requirements are important in that they provide to potential bidders pertinent information which may influence not only their decision to bid, but the subsequent price that they may offer. (*N.J.S.A.* 18A:18A-15).

6. No Unlawful Exclusion of Prospective Bidders

A board may not draft specifications in such a way as to allow only one bidder to perform or qualify. Should any board of education adopt specifications which knowingly excludes all but one bidder, the specifications shall be null and void and of no effect. Accordingly, the purchase, contract, or agreement shall be readvertised and the original contract shall be set aside by the board. (*N.J.S.A.* 18A:18A-15). The Commissioner has determined that so long as multiple bids are received by the board, it would not be in violation of this statute. *Bettencourt v. Board of Education of Borough of Dunellen*, (84:*S.L.D.* January 26.)

Special Requirements

1. Number of Working Days

Specifications shall fix the completion date for the work, or the number of working days to be allowed for completion of the work. Every such contract shall contain a provision specifying that in the event that the number of working days exceeds the amount allowed in the specifications, there shall be a deduction from the contract price or from any wages paid by the board to inspectors. (*N.J.S.A.* 18A:18A-19).

2. American Goods

Specifications shall provide that only manufactured and farm products of the United States, wherever available, be used. (*N.J.S.A.* 18A:18A-20).

3. Provisions for Facilities for Handicapped Persons

Every board of education shall require that all plans and specifications for bids on any contract for the construction, remodeling, or renovation of any public building provide facilities for the physically handicapped. (*N.J.S.A.* 18A:18A-17).

As used in the provisions of the statute, "remodeling or renovation" means:

a. to construct an addition to a building;

b. to alter the design or layout of the public building so that a change or modification of the entrance facilities, toilet facilities, or vertical access is achieved; or

c. to make substantial repairs or alterations to a building. When substantial repairs or alternations are made the following requirements also apply:

- If the cost of making the repairs or alterations exceeds 60% of the value of the building, the entire building shall be made to comply with the statutory requirements for handicapped persons;
- If the cost of making the repairs or alterations is between 30% and 60% of the value of the building, only those portions of the building repaired or altered shall be made to comply with the statutory requirements; or
- If the cost of making the repairs or alterations is below 30% of the value of the building, such repairs or alterations shall be either in accordance with the requirements of this section, or in compliance with their previously required condition and with the same or equivalent material or equipment, provided the general safety and public welfare are not thereby endangered.
- In determining the value of such public buildings, the Board of Education shall use a formula which shall be established by the State Board of Education. This formula may take into account the size, age, type of construction, original building cost and replacement cost of any such building. The State Board of Education has authority to promulgate rules prescribing the kinds, types and quality of the facilities for the physically handicapped. (*N.J.S.A.* 18A:18A-17).
- As a means to assure compliance, the Commissioner of Education is authorized to withhold all or part of any State aid paid to any school district, until that school district has met the requirements of the law concerning facilities for the physically handicapped. (*N.J.S.A.* 18A:18A-17.1).

4. Public Work Contracts Exceeding $20,000.00—Poor Performance Report Required

The specifications shall provide that the board of education, through its authorized agent, shall report to the department as to the contractor's performance upon completion of the contract for every contract which exceeds $20,000.00. The board must also report to the department during performance of the contract should the contractor default in some way. (*N.J.S.A.* 18A:18A-15) (See further discussion under "REPORTING POOR PERFORMANCE OF CONTRACTED WORK" at page 30).

5. Work Requiring Separate Plans, Separate Bids and Separate Contracts

a. *Separate Plans*

Where the entire cost for the construction, alteration or repair of a building exceeds the bid threshold amount, separate plans and specifications must be prepared for each of the following categories (*N.J.S.A.* 18A:18A-18):

- The plumbing and gas fitting work;
- The heating and ventilating systems and equipment;
- The electrical work, including any electrical power plant;
- The structural steel and ornamental iron work;
- All other work and material required for the completion of the project.

b. *Separate Bids*

Where the board of education has prepared separate plans and specifications as discussed above the board of education shall advertise for and receive bids in the following manner (*N.J.S.A.* 18A:18A-18):

- separate bids for each of the above mentioned categories (see above under "Separate Plans"); and also
- bids for a single overall contract that will include all the work and materials required to complete the building.

The bid should include the names of all subcontractors and evidence of performance security from each. The subcontractors must be qualified pursuant to the statute.

c. *Separate Contracts*

Whenever the board has prepared separate plans, and received separate bids, the contracts are to be awarded to the lowest responsible bidder in the following manner:

THE BOARD SHALL AWARD SEPARATE CONTRACTS FOR EACH LISTED CATEGORY TO EACH OF THE LOWEST RESPONSIBLE BIDDERS

- where the total sum of the separate bids for each category (by the lowest responsible bidder) is less than the amount of the bid for a single overall contract (by the lowest responsible bidder).

THE BOARD SHALL AWARD A SINGLE OVERALL CONTRACT TO THE LOWEST RESPONSIBLE BIDDER

- where the amount of the bid for a single overall contract (by the lowest responsible bidder) is less than the total sum of the separate bids for each category (by the lowest responsible bidder). Where the award is to one general contract, payments by the board must be made directly to the subcontractor upon certification by the contractor of the amount due. (*N.J.S.A.* 18A:18A-18).

6. Plans and Specifications for Public Schoolhouses

a. *Preparation*

It should be noted at the outset that the design and construction of a public school facility falls within the purview of the "State Uniform Construction Code Act," notwithstanding any law or regulation to the contrary. (*N.J.S.A.*

52:27D-123.1).

When faced with practical difficulties in meeting the requirements of the State Uniform Construction Code, the designated official in the Bureau of Facility Planning (BOFP) may vary the rules upon application of the district board. (*N.J.A.C.* 6:22-1.1 (a)(5)).

All plans and specifications for public school construction projects shall be prepared by an architect or professional engineer licensed to practice in the State. (*N.J.A.C.* 6:22-1.1(a)(8)).

b. *Approval*

Approval of plans and specifications is done by either the Department of Education (BOFP) or by the municipal construction enforcing agency. Prior to the execution of a contract, plans and specifications must be submitted to and approved by the Department of Education (BOFP), where "educational adequacy" is involved. (See further discussion of "educational adequacy" below). Should there be any changes made after approval of the plans and specifications, they must be submitted to and approved by the Department of Education (BOFP). A copy of all plans and specifications and all changes approved shall be filed with the Department of Education (BOFP). (*N.J.S.A.* 18A:18A-16). If the work does not involve "educational adequacy", (for example, if the work is installation of windows or roofing) then the plans and specifications should be submitted to the municipal construction enforcing agency in accordance with *N.J.A.C.* 5:23-2.

The term "educational adequacy" is used when referring to construction or alternations which have an impact on the learning environment. A review for "educational adequacy" by BOFP is required for the following projects:

- new School Building
- an addition to an existing school building
- a change involving the total number of instructional spaces or the number of any one kind of instructional space (projects that would change the total number by the subtraction or addition of instructional space).
- a change in the dimensions (volume, and/or area) of any instructional space
- the relocation of any existing instructional space
- any change in the use of an existing instructional space
- a change in the general office area or the school board building that involves instructional spaces
- any change in locker rooms including those contained within field houses, weight room and game rooms
- any change to the athletic fields and tracks
- the utilization of mobile units (i.e. trailers, vans)
- the utilization of prefabricated facilities for instructional purposes. The placement of prefabricated facilities, including relocatables, on a school site is considered new construction. (*N.J.A.C.* 6:22-1.1(b)).

c. *Application for Permit*

N.J.S.A. 18A:18A-49 which had eliminated the requirement for a school board to secure a municipal permit is now superceded by the State Uniform

Construction Code (*N.J.S.A.* 52:27D-119 *et seq.*), which does require that a municipal permit be obtained.

Following the release of the plans from the Department of Education (BOFP), the district board shall apply to the municipal construction enforcing agency for the required permit. If the project was reviewed by the Department of Education (BOFP), a copy of the certificate of occupancy obtained from the local construction agency should be sent to the BOFP by the district board. (*N.J.A.C.* 6:22-1.1(a)(4)) (*N.J.S.A.* 52:27D-130).

7. Standards for Purchase of Fresh Milk

For purchases of fresh milk, the board shall require that each vendor agree in writing to purchase an amount of fresh milk from New Jersey producers, or associations of producers that is at least equal to the amount that the vendor is required to furnish to school districts in the State. This agreement is to be made during the year in which the vendor proposes to furnish such milk to the district and is to be filed with the Secretary of Agriculture, who has the duty of enforcing this law. (*N.J.S.A.* 18A:18A-6).

An exception exists in cases where the vendor proves to the Secretary of Agriculture that sufficient milk cannot be obtained from the required New Jersey sources. All vendors who do not comply with the statute and are not within the above exception shall be subject to a penalty of $100.00 to $500.00 for each day of noncompliance. In addition, the vendor shall be ineligible for any contract award for purchases of fresh milk for a period of three years. (See *N.J.S.A.* 18A:18A-6 and *N.J.A.C.* 2:55-1.1 *et seq.*)

BIDDING REQUIREMENTS

Advertisement in Legal Newspaper

1. General Rule

All advertisements for bids shall be published in a legal newspaper sufficiently in advance (at least 10 days) of the date fixed for receiving bids. (*N.J.S.A.* 18A:18A-21).

"Legal newspaper" means a newspaper circulating in the district, printed and published in the English language at least once a week for at least one year continuously. (*N.J.S.A.* 18A:18A-2 (e)).

The advertisement should designate:

- the manner of submitting and of receiving the bids; and
- the time and place at which the bids will be received.

2. Exception

Advertisement for bids under a "set-aside program" shall be made in accordance with *N.J.S.A.* 18A:18A-55 (See further discussion under "SET ASIDE PROGRAMS FOR WOMEN AND MINORITY BUSINESSES" at page 32).

Receipt and Announcement of Bids

Where the specifications provide for the receipt of bids by mail, those bids shall not be opened early, but shall be sealed and opened only for examination at such

time as all bids are unsealed and announced. (*N.J.S.A.* 18A:18A-21).

At the specified time and place, the board's contracting agent shall receive, unseal, and publicly announce the contents of the bids. A record of the bids shall be made in the minutes of the board.

The statute also provides that no bids may be received after the time designated in the advertisement. (*N.J.S.A.* 18A:18A-21). Nevertheless the Appellate Division concluded that a board may waive the time requirement for submission of bids for a reasonably short period. *Young v. West Orange Redevelopment Agency*, 125 *N.J. Super.* 440 (App. Div. 1973). In *Young*, the bidder was delayed by poor weather conditions, but had telephoned ahead. Citing *Young*, the Commissioner found that there was no material departure from the bidding terms where the board delayed opening the bids for fifteen minutes. The delay was due to one of the bidders arriving at the wrong address. *Arnold Steel Co., Inc. v. Board of Education*, (81 *S.L.D.* March 2).

Non-Conforming Bids

Bids which do not conform to the specifications furnished by the board of education shall not be accepted. The board retains the right to reject all bids. (*N.J.S.A.* 18A:18A-22). When a bid is opened and essential information is missing, it may not be supplied thereafter. *Belousofsky v. Board of Education of City of Linden*, 54 *N.J. Super.* 219, at 222 (A.D. 1959).

On the other hand, minor irregularities and immaterial variances in the form of the bid may be waived where they do not interfere with competitive bidding. *Saturn Construction Co. v. Middlesex County Freeholders*, 181 *N.J. Super.* 403 (App. Div. 1981).

Rejection of Bids

The board has the right to reject all bids. (*N.J.S.A.* 18A:18A-22). However, this right cannot be exercised arbitrarily and without good reason. When a board decides in good faith that the purposes of the bidding statute are being violated, it may reject all bids submitted and in its discretion order a readvertising of the contract. This determination is entitled to a presumption of correctness absent impropriety on the part of the board. *Durling Farms, Inc. v. Board of Education of Township of Montville*, 75 *S.L.D.* 733.

Certificate of Ability to Perform Contract

A board of education may require from any bidder a certificate showing that he owns, leases, or controls all the necessary equipment that is required by the specifications and advertisements. Should the bidder not be the actual owner or leasee of such equipment, his certificate shall state the source from which the equipment will be obtained. In addition, the bidder must submit a certificate from the owner or person in control of the equipment granting said bidder control of the equipment during the completion of that portion of the contract for which its use is necessary. (*N.J.S.A.* 18A:18A-23).

Bid Security

A bidder may be required to submit with his bid a guarantee payable to the

board of education in the amount of 10% of the bid, but not in excess of $20,000, except as otherwise provided by statute. (*N.J.S.A.* 18A:18A-24). The guarantee should state that if the contract or agreement is awarded to the bidder, then said bidder will enter into such contact and will furnish any performance bond (defined at *N.J.A.C.* 6:20-8.4 (c)) or other security required as indemnification. Should any law or regulation of the United States impose any condition which requires a guarantee in an amount other than 10% of the bid or in excess of $20,000.00, then the federal regulations shall govern. (*N.J.S.A.* 18A:18A-24).

The guarantee may be given by certified check, cashiers check or by bid bond. A "bid bond" is a written guarantee, in the form of a certificate that is payable to the district board, stating that the bidder will enter into a contract within the time specified; will furnish any performance bond or other security required; and will provide payment for the damages suffered by the board as a result of the bidder's refusal to sign the contract. (*N.J.A.C.* 6:20-8.4 (a)).

All bid bonds must:

- be given by a responsible surety or insurance company licensed to operate in New Jersey. (NOTE: District boards of education are prohibited from requiring that bidders submit a bid bond from a particular surety or insurance company); or
- be given by a responsible individual residing in New Jersey. (NOTE: The district board of education may reject such individual bid bond if it is not satisfied with the sufficiency of the individual surety offered); or
- be in the form of a certificate which identifies the bidder, the surety company,the insurance company or individual surety, and the board.

Performance Bond

A "performance bond" is a written guarantee, in the form of a certificate and is payable to the district board. The bond states that the bidder will promptly and faithfully perform the contract between the bidder and the board of education and, should there be a default, that the bidder shall provide for the completion of the contract or provide sufficient funds to pay the cost of completion of the contract. (*N.J.A.C.* 6:20-8.4 (c)).

When a performance bond is required by the advertisement or specifications for a contract, every board of education shall require from every bidder a certificate from a surety company stating that it will provide the contractor with a bond in such sum as is required . The bidder may offer the bond of an individual instead of that of a surety company, by submitting with the bid a certificate similar to that required of a surety company, which has been signed by the said individual. (*N.J.S.A.* 18A:18A-25). If the board is not satisfied with the sufficiency of the individual surety offered, it may reject any such bid.

Qualification of Bidders—The "Qualification Threshold"

1. Rules Governing Qualification

"Qualification" is the procedure by which all prospective bidders for public work with the board are "classified" as to the character and amount of public work on which they shall be qualified to submit bids. (*N.J.A.C.* 6:20-7.1). The qualification standards are set according to the financial ability and experience of the bid-

ders and the capital and equipment available to them. The standards are set by the Department of Treasury. *N.J.S.A.* 18A:18A-27; *N.J.A.C.* 6:20-7.2.

In many instances, a board of education must require all persons proposing to bid on a contract be classified, in accordance with the statutory provisions on "qualification of bidders". This is required when:

- the contract is one requiring public advertisement for bids; and
- the entire cost will exceed $20,000.00 (the qualification threshold) (*N.J.S.A.* 18A:18A-26).

The bidder must submit along with the bid, an affidavit disclosing any material adverse change in the information concerning his qualifications transpiring subsequent to the submission of the last statement. If there has been no such change, the affidavit should so state.

The failure of a bidder to qualify prior to the date set for the reception of bids will disqualify such bidder from submitting a bid. The local board of education is without authority to accept a bid from a contractor who has failed to qualify, and the qualification requirement may not be waived by the board. The qualification of the contractor after the date fixed for submission of bids, but prior to the actual award of the contract does not satisfy the requirements of the statute. *Begraft v. Borough of Franklin*, 133 *N.J. Super* 415 (App. Div. 1975).

2. Classification of Prospective Bidders

Application for classification is made by filing with the department a statement under oath which sets forth the financial ability, adequacy of plant and equipment, organization and prior experience of the prospective bidder as well as other pertinent and material facts. (*N.J.S.A.* 18A:18A-28). (*N.J.A.C.* 17:19-2.1).

Whenever a bidder has not submitted the required statement within a period of one year preceding the date of opening of bids for the contract, such bidder shall not be qualified to bid on any public work where the cost exceeds the qualification threshold amount. (*N.J.S.A.* 18A:18A-32).

Under the provisions of *N.J.S.A.* 18A:18A-33, a person who falsifies any information pertaining to bid qualification is subject to fines, imprisonment, disqualification from bidding and/or forfeiture of bid security.

Further guidelines covering the classification of bidders, including trade classification and performance ratings are set forth in the regulations. (See *N.J.A.C.* 17:19-1.1 *et seq.*).

THE CONTRACT

Awarding the Contract:

1. Time for Making Award

All contracts shall be awarded or rejected by the board within such time as may be specified in the invitations to bid. In no case, however, shall the award or rejection of any contract be more than 60 days, unless the board request that the bids be held for consideration for a longer period as may be agreed for any bidders who have consented thereto. (*N.J.S.A.* 18A:18A-36).

2. Award to Lowest Responsible Bidder

All purchases, contracts or agreements requiring public advertisement for bids shall be awarded to the lowest responsible bidder. (*N.J.S.A.* 18A:18A-37).

a. *Responsible Bidder*

On occasion, a board may have reason to believe that the lowest bidder is not a "responsible bidder." The lowest bid may be rejected by the board if, in fact, the lowest bidder is not a responsible bidder. This is a determination the board must make after conducting an investigation and upon notice and hearing to the bidder affected. Such a decision will not be disturbed by the court except there is evidence of bad faith. *Schwitzer v. Board of Education*, 79 *N.J.L.* 342 (1910).

The lowest bidder must also be afforded a hearing on the issue of responsibility prior to an award of the contract to a higher bidder. *Automatic Laundries, Inc. v. Bayonne Housing Authority*, 45 *N.J. Super.* 266,270 (Law Div. 1957); *Case Box Lunch, Inc. v. Board of Education of the City of Trenton*, 72 *S.L.D.* 479.

Some criteria for determining the "responsibility of" a bidder were discussed by the Commissioner in *Crater v. Board of Education of the Township of Bedminister*, 4 *N.J.S.L.D.* 6:

- The question for the determination of the board of education is whether the bidder is so lacking in experience, financial ability, machinery and facilities as to justify the belief upon the part of fair-minded men that he would be unable to carry out the contract if awarded to him.
- To reject the bid of the lowest bidder, there must be such evidence of the irresponsibility of the bidder as would cause fair-minded and reasonable men to believe that it is not for the best interests of the school district and the public at large to award the contract to the lowest bidder.
- The lack of ability to work in harmony or to enforce the terms of a previous contract by the board of education cannot be the controlling factor in determining the bidder's responsibility. Disputes involving controverted questions of fact with reference to the performance of a previous contract do not constitute grounds for declaring a bidder irresponsible if such disputed matters can be taken care of under a contract properly safeguarding the public interest, with a contractor who is financially responsible.
- To set aside the determination of the board of education that a bidder is irresponsible, it is not necessary to prove corruption or fraud on the part of the board of education. The determination of the board of education must be set aside if the evidence in the record does not justify its determination according to the principles stated above."

b. *Lowest bidder*

In the absence of a question as to financial responsibility, then the "low bidder" is entitled to an award of the contract as a matter of right. *Frank P. Farrell, Inc. v. Board of Education of Newark*, 137 *N.J.L.* 408 (1948) The status of the lowest bidder is not one of grace, but one of right, and may not be lightly disturbed for it is based upon competition, a state policy. *Sellitto v. Cedar Grove Township*, 133 *N.J.L.* 41,42 (Sup. Ct. 1945).

The term "lowest bidder" is not restricted to the amount of the bid, but

also requires that the bid conforms with the specifications. *Hillside Township v. Sternin*, 25 *N.J.* 317,324 (1957). No bids are to be accepted which do not conform to the specifications. (See discussion under "NON-CONFORMING BIDS" at page 24).

Boards are also cautioned to avoid line by line comparision of cost. The award should be based on the bid, which as a whole is most advantageous to the board, with total cost being the key factor. *Nu-Way Concessionaires, Inc. v. Board of Education of Union City*, (85 *S.L.D.*: September 19). In *Nu-Way*, the petitioning bidder claimed that it should have received the contract because its bid proposed a lower administrative/service fee. (The administrative/service fee of the petitioning bidder and the successful bidder were .016 and .04 per meal, respectively.) The Commissioner, recognizing that lowest responsible bidder is not synonymous with lowest administrative/service fee, concluded that the board had awarded the contract to the bidder whose bid was the most financially advantageous to the district. The Commissioner noted that the board was not compelled to consider the amount of the administrative service fee alone as the sole factor upon which to base its determination of lowest bid.

A board would be mistaken, however, to believe that it may select any bid by simply stating that it is most advantageous to the school district. The crux of the *Nu-way* decision was that the board submitted testimony via an accountant who analyzed both bids. Some of the factors other than the service fee that were considered in the cost analysis were: the number of days covered by the contract, the number of meals, expenses, and profits. Also taken into consideration was the fact that the successful bidder did not require the board to reimburse deficits nor were there separate charges for insurance and trucking expenses; as these amounts were included in the cost per meal estimate. In view of all of these factors which had a bearing on the ultimate cost of the contract, the bid selected was found to be most advantageous even though the administrative/service fee was slightly higher than that of the rejected bid.

3. Bid Security Returned

If requested, all bid security other than that of the three apparent lowest responsible bidders shall be returned after 10 days from the opening of the bids (except Sundays and holidays). The bids of such bidders shall be considered withdrawn. Within three days after the awarding of the contract and approval of the performance bond, the remaining unsuccessful bidders shall have their bid security returned to them. (*N.J.S.A.* 18A:18A-36).

4. Equal Bids

Where two or more proposals or bids are for the same amount and such bids are the lowest being submitted by a responsible bidder, the board of education may use its discretion in awarding the contract to any one of such bidders. (*N.J.S.A.* 18A:18A-38).

5. Filing of the Contract

Whenever the entire cost of the contract exceeds $10,000, a copy shall be filed with the Department of Education (BOFP) within 10 days after its execution. (*N.J.S.A.* 18A:18A-39). All emergency contracts shall be filed with the Bureau of Facility Planning and office of the county superintendent of schools within three days after the awarding of the contract or agreement. (*N.J.A.C.* 6:20-8.5).

6. Form and Execution of Contracts and Bonds

The statute mandates that all contracts for the performing of work or furnishing materials, supplies or services shall be in writing. Authority is given to the State Board of Education to prescribe the forms and manner—

- for the making and execution of contracts
- for the approval of all guarantee, indemnity, fidelity and other bonds.

7. Liquidated Damages

A liquidated damages clause is a provision which states that a specific sum of money will be recoverable as damages by a particular party should a breach of the agreement occur. This makes it unnecessary for a court to determine damages in the event of a breach.

Liquidated damages may be included in the contract or agreement to cover the violation of any of the terms and conditions thereof, the failure to perform in accordance with the terms and condition of such contract, or the failure to perform in accordance with statutory requirements under the "Public Schools Contract Law." (*N.J.S.A.* 18A:18A-41)

8. Contracts Extending Beyond the Fiscal Year

Boards of education are permitted to enter into contracts exceeding the fiscal year in the following areas (*N.J.S.A.* 18A:18A-42):

a. Supplying of—
- fuel for heating purposes, for any term not exceeding in the aggregate three years;
- fuel or oil for use of automobiles, autobuses, motor vehicles or equipment, for any term not exceeding in the aggregate three years;
- thermal energy produced by a cogeneration facility, for use for heating or process steam for any term not exceeding 20 years; or

b. Blowing and removal of snow and ice for any term not exceeding in the aggregate three years; or

c. Collection and disposal of garbage and refuse, for any term not exceeding in the aggregate three years; or

d. Data processing service, for any term of not more than five years; or

e. Insurance for any term of not more than three years; or

f. Leasing or servicing of automobiles, motor vehicles, electronic communications equipment, machinery and equipment of every nature and kind, for any term not exceeding in the aggregate, five years. Such contracts shall be entered into only subject to and in accordance with rules and regulations promulgated by the State Board of Education (See *N.J.A.C.* 6:20-8.2); or

g. Supplying of any product or the rendering of any service by a telephone company which is subject to the jurisdiction of the Board of Public Utilities for a term not exceeding five years; or

h. Materials, supplies or services that are required on a recurring basis from year to year, for any term not exceeding in the aggregate, two years. Such contract may be renewed yearly for a period not exceeding three additional years without any further solicitation for bids where the board has determined that the services are being performed in an effective and efficient

manner, or that the materials and supplies continue to meet the original specifications. Where a board elects to renew an existing contract, the terms and conditions of the contract shall remain substantially unchanged and any increase in the contract cost over the three year period shall be no greater than a total of 20% over the initial costs; or

i. Driver education instruction conducted by private, licensed driver education schools, for any term not exceeding in the aggregate, three years; or

j. Performance of work or services or the furnishing of materials, supplies or equipment for the purpose of conserving energy in buildings owned by any local board of education, the entire price of which shall be established as a percentage of the resultant savings in energy costs, for a term not to exceed 10 years. However, these contracts shall be entered into in accordance with and subject to the rules and regulations promulgated by the Department of Energy pursuant to the "Administrative Procedure Act," P.L. 1968. c.410 (*N.J.S.A.* 52:14B-1 *et seq.*), establishing a methodology for computing energy costs.

All multiyear leases and contracts entered into pursuant to the above provisions shall contain: (1) a clause making them subject to the availability and appropriation annually of sufficient funds in each additional year; or (2) an annual cancellation clause.

The following contracts are excepted from this requirement:

- contracts for the leasing or servicing of equipment supplied by a telephone company (see item "g" above).
- contracts for insurance (see item "e" above).
- contracts for thermal energy (see item "a" above).
- contracts for the performance of work or services or the furnishing of materials, supplies or equipment to promote energy conservation (see item "j" above).

9. Yearly Renewal of Contract

Every contract or agreement for the services of a food service management company, which meets federal standards and procurement requirements pursuant to 7 *C.F.R.* Section 210.8a may be renewed yearly for not more than two additional years upon a finding by the board that the services are being performed in an effective and efficient manner. However, if a board of education elects to renew an existing contract, the terms and conditions of such contract shall remain substantially unchanged and any increase in the contract cost of the food or services, or both, shall be no greater than 20% over the additional two year period. (*N.J.S.A.* 18A:18A-42.1).

10. Reporting Poor Performance of Contracted Work

Upon completion of the contract, a board of education must submit a performance report to the Department of Treasury, Division of Building and Construction. The boards shall also furnish such report from time to time during performance if the contractor is in default. (*N.J.S.A.* 18A:18A-15). The Department shall consider such reports as a basis for denial of a favorable classification to all prospective bidders.

It is of the utmost importance that boards comply with these requirements, as the Division of Building and Construction would have no other means of knowing that a contractor should be deemed unqualified. By complying with this sim-

ple provision, boards of education would assist in protecting each other from contractors who do a poor job.

SCHOOL BUILDING REPAIRS: SUPERVISION, INSPECTION, CONDEMNATION, REJECTION

The business manager or any appropriate officer of the board to whom such power has been delegated pursuant to *N.J.S.A.* 18A:16-1.2 shall—

- supervise the repairs to all school buildings as provided by *N.J.S.A.* 18A:17-28.
- inspect all work done and materials or supplies furnished under contract.
- condemn any work and reject any material or supplies, which in his judgment do not conform to the specifications of the contract, subject to the approval of the board. (*N.J.S.A.* 18A:18A-43; *N.J.S.A.* 18A:18A-44).

SALE OF PERSONAL PROPERTY

Bidding Requirement

1. Property Covered

Boards of education may, by resolution, authorize the sale of its personal property not needed for school purposes. The personal property shall be sold at a public sale to the highest bidder as long as—

- the estimated fair value of the personal property in any one sale exceeds the "bid threshold" amount as calculated pursuant to *N.J.S.A.* 18A:18A-3 ($8,100 effective July 1, 1985 as determined by the Governor);
- the personal property to be sold is neither livestock nor perishable goods. (*N.J.S.A.* 18A:18A-45)

2. Property Exempted

In the following circumstances, personal property may be sold at a private sale without advertising for bids:

- where the estimated fair value of the personal property to be sold does not exceed the bid threshold amount in any one sale.
- where the personal property is either livestock or perishable goods.
- where the personal property is to be sold to the United States, the State of New Jersey, another board of education, or to any body politic.
- where the board has advertised for bids and received no bids in response. In no event may the personal property be sold at less than the estimated fair value. However, the board may reoffer the property at public sale if it so desires. (*N.J.S.A.* 18A:18A-45).

3. Right to Reject All Bids

The board of education has the right to reject all bids if it is deemed to be in the

public interest. Where a board has rejected all bids, it may readvertise the personal property for subsequent public sale. Should the board elect to reject all bids at the second public sale, it may then sell such personal property at a private sale without further publication. However, the negotiated price at the private sale shall not be less than the highest price of any of the bids rejected at the two preceding sales, nor shall any of the terms or conditions of sale be changed or amended. (*N.J.S.A.* 18A:18A-45).

Notice of Sale

Notice of the public sale shall be published once in a legal newspaper and shall include—

- date, time and place of the public sale;
- description of the items to be sold; and
- the conditions of sale.

Such sale shall be held not less than seven nor more than 14 days after the publication of the notice. (*N.J.S.A.* 18A:18A-45).

SET ASIDE PROGRAMS FOR WOMEN AND MINORITY BUSINESSES

Instituting A Program

1. Establishing A "Set Aside" Goal

A board of education may, by resolution, establish set-aside programs for the following:

- qualified minority business enterprises
- qualified women business enterprises
- qualified small business enterprises

In authorizing such programs, the board shall establish a goal of setting aside a certain percentage of the dollar value of total procurements to be awarded as set aside contracts to either qualified minority business enterprises, qualified women business enterprises, or qualified small business enterprises. Where designations are made, it should be done prior to any required advertisement for bids. (*N.J.S.A.* 18A:18A-52)

The board may work to achieve such goal by requiring that portions of particular contracts be subcontracted to one of the qualified business enterprises. A board of education shall make a good faith effort to attain any goal that it has established. (*N.J.S.A.* 18A:18A-53).

2. Designation of Contracts

Despite the usual requirement of selecting the lowest responsible bidder, whenever a board of education has established a certain set-aside program and is likely to receive bids from at least two enterprises within such program, the board shall designate that the contract be awarded to a qualified minority business enter-

prise, a qualified women business enterprise, or a qualified small business enterprise "at a fair and reasonable price." (*N.J.S.A.* 18A:18A-55). When a board determines that two bids cannot be obtained from an appropriate qualified business enterprise, the board may withdraw the designation of the set-aside contracts and resolicit bids on an unrestricted basis. The cancelled designation shall not be considered in determining whether or not the board attained its established "set-aside" goal. (*N.J.S.A.* 18A:18A-56).

3. Advertisements for Bids

When certain contracts have been designated for a set aside program, the advertisement for bids shall indicate such designation. All advertisements for such bids shall be purchased in at least one newspaper which will best provide notice to the appropriate qualified business enterprise. (*N.J.S.A.* 18A:18A-55). The advertisement must allow at least 10 days for bids to be submitted.

4. Rejection of Bids

Where the board of education determines that the acceptance of the lowest responsible bid will result in the payment of an unreasonable price, the board shall reject all bids and withdraw the designation of the set-aside contracts. The board shall notify the appropriate qualified business enterprises of the set-aside cancellation. The notification should be in writing, disclosing the reasons for the rejection and the board's intent to resolicit bids on an unrestricted basis. The cancelled bid solicitation shall not be considered in determining whether or not the board attained its established set-aside goal. (*N.J.S.A.* 18A:18A-56).

Annual Report of Set-Aside Goals

A report shall be prepared by January 31st of each year for any board of education which has established an appropriate set-aside program. The report shall describe the board's effort in attaining the set-aside goals and the percentage of the dollar value of total procurements awarded in the immediately preceding local fiscal year. The board of education shall publish a list of its attainments in at least one newspaper circulating in the school district by March 1st of each year. (*N.J.S.A.* 18A:18A-57).

Penalties for False Information

Should any board of education determine that a business has been classified as a qualified minority, small, or women business enterprise on the basis of false information knowingly supplied by the business and such business has been awarded a contract to which it would not otherwise have been entitled, then the board shall have the authority to act as follows:

1. Assess the business any difference between the contract amount and what the local board of education's cost would have been if the contract had not been awarded to the lowest responsible bidder;
2. In addition to the amount assessed in item #1 above, assess the business a penalty in an amount of not more than 10% of the amount of the contract involved; and
3. Order that the business be ineligible to transact any business with the local board of education for a period to be determined by the local board of education.

Before any final determination, assessment, or order is made pursuant to these provisions, the board shall afford the business an opportunity for a hearing on the reasons for the imposition of the penalties that have been imposed. (*N.J.S.A.* 18A:18A-33).

JOINT PURCHASING AGREEMENTS

A board of education may provide by joint agreement for the purchases of supplies, materials or work for their respective districts with—

- one or more other boards of education; or
- the governing body of the municipality or county within whose boundaries any such district is wholly or partly located (*N.J.S.A.* 18A:18A-11).

The following items should be set forth in the agreement between the governmental bodies for joint purchases:

1. the categories of work;
2. the material and supplies to be purchased;
3. the manner of advertising for bids and awarding of contracts;
4. the method of payment by each participating board of education, municipality or county; and
5. other matters deemed necessary to carry out the purposes of the agreement.

The share of expenditures for purchases for each participant under the agreement shall be appropriated and paid in the manner set forth in the agreement and in the same manner as for other expenses of the participant. (*N.J.S.A.* 18A:18A-12).

All provisions of the bidding laws and the applicable rules and regulations of the State Board shall govern such purchases and all agreements pertaining thereto. (*N.J.S.A.* 18A:18A-13).

Boards of education are specifically authorized to enter into contracts or leases with other boards of education for either the joint operation of electronic data processing facilities or to provide electronic data processing services. (*N.J.S.A.* 18A:18A-14.2). "Electronic data processing", as used in the statute, is the storage, retrieval, combination or collation of items of information and the translation of that information into electrical currents by means of electronic equipment. (*N.J.S.A.* 18A:18A-14.1).

Should any controversy or dispute arise among the parties to a joint purchasing agreement, other than a municipality or a county, the same shall be referred to the county supperintendent for the county in which the districts are located. The determination of the county superintendent shall be binding, subject to appeal to the commissioner and the State Board.

In instances where the districts are situate in more than one county, the matter shall be referred to the county supperintendent of both counties for joint determination. If the superintendents are unable to agree upon a joint determination within 30 days, the controversy or dispute shall be referred to the commissioner. (*N.J.S.A.* 18A:18A-14).

MISCELLANEOUS PROVISIONS

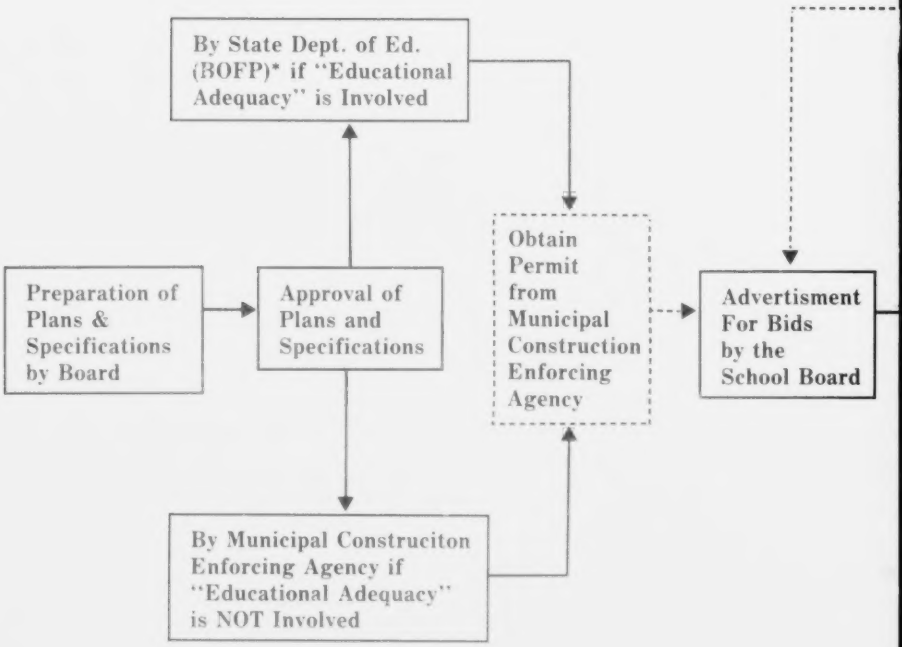
No Action for Damages for Actions of Officials

No action for damages shall lie against the State Board, any State official, or any board of education or any of its officers due to any action taken pursuant to the "Public Schools Contract Law." (*N.J.S.A.* 18A:18A-46).

Transportation Contracts

The "Public School Contracts Law" is not applicable to contracts for the transportation of pupils to and from school. (*N.J.S.A.* 18A:18A-49.1). Such contracts are governed by Chapter 39 of Title 18A.

PUBLIC SCHOOL CONTRACTS—BIDDING PROCEDURE FOR PUBLIC WORKS CONTRACTS


By State Dept. of Ed. (BOFP)* if "Educational Adequacy" is Involved
Preparation of Plans & Specifications by Board
Approval of Plans and Specifications
Obtain Permit from Municipal Construction Enforcing Agency
Advertisment For Bids by the School Board
By Municipal Construciton Enforcing Agency if "Educational Adequacy" is NOT Involved

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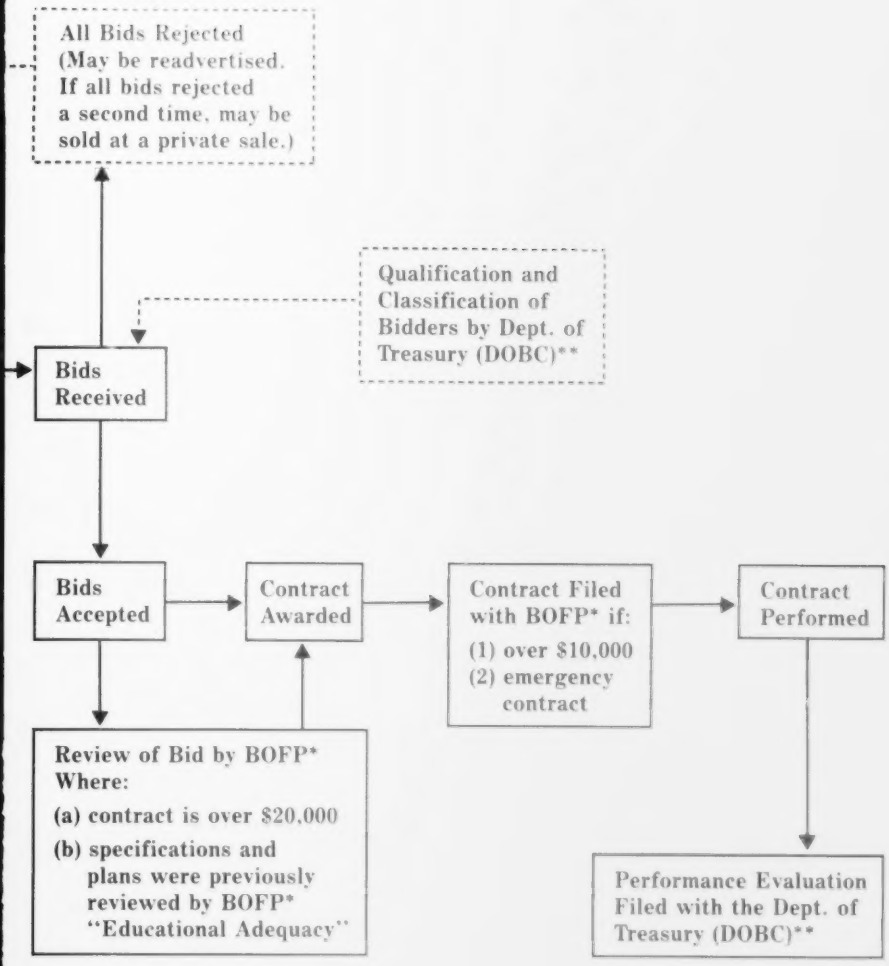
*BOFP = Bureau of Facility Planning

**DOBC = Division of Building and Construction


All Bids Rejected
(May be readvertised. If all bids rejected a second time, may be sold at a private sale.)
Qualification and Classification of Bidders by Dept. of Treasury (DOBC)**
Bids Received
Bids Accepted
Contract Awarded
Contract Filed with BOFP* if:
(1) over $10,000
(2) emergency contract
Contract Performed
Review of Bid by BOFP* Where:
(a) contract is over $20,000
(b) specifications and plans were previously reviewed by BOFP* "Educational Adequacy"
Performance Evaluation Filed with the Dept. of Treasury (DOBC)**

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New Jersey School Boards Association

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